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MACHINCHANG SKYWAYS SDN BHD & ANOR v. LEMBAGA PEMBANGUNAN LANGKAWI & ANOR AND ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
BALIA YUSOF WAHI JCA
TENGKU MAIMUN TUAN MAT JCA
[CIVIL APPEALS NO: K-02(IM)-2716-11-2012 &
K-02(IM)-2808-11-2012]
25 SEPTEMBER 2014

C

CIVIL PROCEDURE: *Limitation of action – When cause of action accrued – Appellants withdrew first suit due to negotiation of settlement – Failure to reach settlement between parties – Re-filing of fresh suit outside limitation period – Reliance on letter marked as without prejudice – Whether admissible – Whether*
D *appellants expected to comply with requirement of law on limitation when filing fresh suit – Whether action time-barred – Limitation Act 1953, s. 6 – Public Authorities Protection Act 1948, s. 2*

CIVIL PROCEDURE: *Summary application – Rules of the High Court 1980, O. 14A – Issue on limitation of action – Whether issues raised required thorough*
E *investigation at full trial – Whether facts disputed by parties – Whether action struck out – Limitation Act 1953, s. 6 – Public Authorities Protection Act 1948, s. 2*

EVIDENCE: *Without prejudice communication – Admissibility – Negotiations for*
F *settlement – Reliance on letter marked as without prejudice – Respondents agreed that suit can be filed outside limitation period if parties failed to reach settlement – Allegation of – Filing of fresh suit outside limitation period – Whether appellants expected to comply with requirement of law on limitation when filing fresh suit – Whether reliance on letter without prejudice allowed*

G ***LIMITATION:*** *Public Authorities Protection Act 1948 ('PAPA') – Action against Lembaga Pembangunan Langkawi – Whether three years limitation period under PAPA applicable to action against Lembaga – Lembaga Pembangunan Langkawi Act 1990, s. 6*

The first respondent ('first defendant') was the owner of the Langkawi cable
H car system and had entered into a joint venture agreement ('JVA') with the first appellant ('first plaintiff') on 28 August 2002 where both parties agreed to manage, maintain and operate the cable car system. As a result, the Langkawi Cable Sdn Bhd ('the second plaintiff') was formed. On 30 November 2002, the first defendant entered into an agreement with
I Syarikat Prasarana Negara Bhd ('the second defendant') where the latter was appointed as the exclusive operator for the maintenance, operation and management of the cable car system ('Prasarana agreement'). The plaintiffs

then filed a suit on 10 December 2002 against the defendants to restrain them from interfering with the operation of the cable car system and for damages which arose due to the breach of the JVA. The plaintiffs contended that at the material time, the first defendant approached the first plaintiff to settle the matter and the plaintiffs withdrew the suit but nevertheless maintained control of the cable car system pending negotiation of a settlement. The plaintiffs contended that in response to the plaintiffs' terms of settlement, the first defendant through its solicitors' letter dated 3 January 2003, represented that it would make appropriate compensation for the plaintiffs' losses and damages. It was argued that the 'without prejudice' letter also stated that if the parties were unable to reach a settlement in due course, the plaintiffs were at liberty to file a fresh suit to recover the losses and damages suffered. Pending finalisation of the proposed settlement, the plaintiffs delivered possession of the cable car system to the second defendant. However, no settlement was reached between the parties and on 23 November 2008, the plaintiffs filed a fresh suit against the defendants where the cause of action was based on the tort of conspiracy, breach of the JVA and tort of inducement of breach of contract. It was pleaded, *inter alia*, that (i) the second defendant had wrongfully and without reasonable justification induced the first defendant to breach the JVA; and (ii) the defendants had conspired to injure the interest of the plaintiffs. The defendants argued that the Prasarana agreement was entered between the parties based on the decision of the then Minister of Finance and Prime Minister and the plaintiffs had voluntarily surrendered the management of the cable car system. The first defendant counterclaimed against the plaintiffs for a declaration that the JVA be terminated jointly. Against the second plaintiff, the first defendant prayed for the surrender of vacant possession of the retail outlets which was carried out by the second plaintiff at the cable car station and for damages which arose from the second plaintiff's occupation of these outlets. The defendants took out separate applications under O. 14A and/or O. 33 r. 2 of the Rules of the High Court 1980 and sought determination of the following questions of law, *ie*, whether the plaintiffs' fresh suit was barred by limitation pursuant to s. 6 of the Limitation Act 1953 and/or s. 2 of the Public Authorities Protection Act 1948 ('PAPA'). The applications also prayed for the fresh suit to be dismissed and for final judgment to be entered against the second plaintiff in terms of the first defendant's counter claim. The plaintiffs' action was struck out and the Judicial Commissioner ('JC') allowed the defendants' applications holding, *inter alia*, that (i) the plaintiffs had voluntarily handed over the cable car system to the second defendant; and (ii) the plaintiffs' action was time-barred. The JC also did not admit the 'without prejudice' letter. Hence, these appeals. The plaintiffs submitted that the conduct of the defendants in dealing with the plaintiffs was an issue that required thorough investigation at a full trial since there were disputed facts in this case.

Held (dismissing appeals with costs)
Per Tengku Maimun Tuan Mat JCA delivering the judgment of the court:

(1) Among the material facts that were not in dispute were: (i) the appointment of the second defendant to operate the cable car system was pursuant to the decision of the then Minister of Finance and also the Prime Minister, the same manner in which the JVA was entered into between the first plaintiff and the first defendant; and (ii) in adherence to the decision of the Prime Minister, the second plaintiff had surrendered the cable car system to the second defendant in good faith. The only issue outstanding between the plaintiffs and the defendants was in respect of payment of compensation or the out of pocket expenses incurred by the plaintiffs. (para 18)

(2) On 10 November 2002, the entire set of facts which gave rise to an enforceable claim was present. The amended statement of claim showed that the plaintiffs knew about the date 10 November 2002. Further, the fact that the plaintiffs knew about the second defendant taking over the maintenance, operation and management of the cable car system on 10 November 2002 was also evident from the plaintiffs' solicitors' letter dated 8 December 2002 to the first defendant. It was at that point of time that there was an infringement or threat of infringement to the plaintiffs' right under the JVA. Hence, the filing of the fresh suit by the plaintiffs on 23 November 2008 was beyond the six years limitation period under s. 6 of the Limitation Act 1953 and beyond the three years limitation period under the PAPA which was applicable to the first defendant pursuant to s. 6 of the Lembaga Pembangunan Langkawi Act 1990. (paras 20-23)

(3) Since the three years limitation period had expired, there was no issue of the plaintiffs suing the first defendant for the tort of conspiracy. Consequently, the cause of action for conspiracy against the second defendant could not stand as one of the ingredients to be satisfied is that there must be an agreement between two or more persons. (para 27)

(4) The JC did not err in refusing to admit the 'without prejudice' letter. There was nothing in the said letter to suggest that the defendants had agreed to the re-filing of a fresh suit outside the limitation period. It was reasonable to expect the plaintiffs to comply with the requirement of the law on limitation in the event they decided to file a fresh suit. (para 30)

(5) The judgment given on the first defendant's counterclaim was not perverse given that the plaintiffs had surrendered the cable car system. Further, there was no affidavit from the plaintiffs to deny or rebut the first defendant's averment that the plaintiffs were in occupation and carried on businesses at the retail outlets without paying any rent. (para 31)

Bahasa Malaysia *Translation Of Headnotes*

Responden pertama ('defendan pertama') adalah pemilik sistem kereta kabel Langkawi dan telah memasuki satu perjanjian usahasama ('JVA') dengan perayu pertama ('plaintif pertama') pada 28 Ogos 2002 di mana kedua-dua pihak telah bersetuju untuk mengurus, menjaga dan mengendalikan sistem kereta kabel tersebut. Dengan itu, Langkawi Cable Sdn Bhd ('plaintif kedua') telah ditubuhkan. Pada 30 November 2002, defendan pertama telah memasuki satu perjanjian dengan Syarikat Prasarana Negara Bhd ('defendan kedua') di mana defendan kedua telah dilantik sebagai pengendali eksklusif bagi penyenggaraan, pengendalian dan pengurusan sistem kabel itu ('perjanjian Prasarana'). Plaintif-plaintif kemudian telah memfailkan satu tindakan pada 10 Disember 2002 terhadap defendan-defendan untuk menghalang mereka daripada campur tangan dalam operasi sistem kereta kabel dan kerugian yang berbangkit daripada kemungkiran JVA. Plaintif-plaintif menyatakan bahawa pada masa material, defendan pertama telah meminta plaintif pertama menyelesaikan perkara ini dan plaintif-plaintif telah menarik balik tindakan itu tetapi masih mengawal sistem kereta kabel sehingga perundingan untuk suatu penyelesaian dibuat. Plaintif-plaintif menghujahkan bahawa sebagai balasan kepada terma-terma penyelesaian plaintif-plaintif, defendan pertama telah, melalui surat peguamcaranya bertarikh 3 Januari 2003, menyatakan bahawa ia akan memberi pampasan berpatutan bagi kehilangan dan kerugian yang dialami oleh plaintif-plaintif. Adalah dihujahkan bahawa surat 'tanpa prejudis' itu menyatakan bahawa jika pihak-pihak masih tidak mencapai suatu penyelesaian, maka plaintif-plaintif mempunyai kebebasan memfailkan tindakan baru untuk mendapatkan ganti rugi. Sementara menunggu pemutusan cadangan penyelesaian dimuktamadkan, plaintif-plaintif telah memberi milikan sistem kereta kabel kepada defendan kedua. Walau bagaimanapun, tiada penyelesaian dicapai antara kedua-dua pihak dan pada 23 November 2008, plaintif-plaintif telah memfailkan satu tindakan baru terhadap defendan-defendan di mana kausa tindakan adalah berdasarkan tort konspirasi, kemungkiran JVA dan tort mendorong kemungkiran kontrak. Adalah diplidkan, antara lain, bahawa (i) defendan kedua tersilap dan tanpa alasan munasabah telah menghasut defendan pertama untuk memungkiri JVA; dan (ii) defendan-defendan telah berkonspirasi untuk mencederakan kepentingan plaintif-plaintif. Defendan-defendan pula menghujahkan bahawa perjanjian Prasarana yang dimasuki antara pihak-pihak adalah berdasarkan keputusan Menteri Kewangan dan Perdana Menteri terdahulu dan plaintif-plaintif telah menyerahkan pengurusan sistem kereta kabel secara sukarela. Defendan pertama menuntut balas terhadap plaintif-plaintif untuk satu deklarasi bahawa JVA dibatalkan secara bersama. Terhadap plaintif kedua, defendan pertama menuntut penyerahan milikan kosong gerai-gerai yang dijalankan oleh plaintif kedua di atas stesen kereta kabel dan untuk ganti rugi yang berbangkit daripada penghunian gerai-gerai tersebut. Defendan-defendan telah memfailkan permohonan berasingan di bawah A. 14A dan/atau A. 33 k. 2 Kaedah-

Kaedah Mahkamah Tinggi 1980 dan menuntut penentuan persoalan-persoalan undang-undang berikut, iaitu, sama ada tindakan baru plaintif-plaintif terhalang oleh had masa di bawah s. 6 Akta Had Masa 1953 dan/atau s. 2 Akta Perlindungan Pihak Berkuasa Awam 1948 ('PAPA'). Permohonan-permohonan tersebut juga menuntut supaya tindakan baru itu ditolak dan penghakiman muktamad dimasukkan terhadap plaintif kedua berdasarkan terma-terma tuntutan balas defendan pertama. Tuntutan pihak plaintif dibatalkan dan Pesuruhjaya Kehakiman ('PK') membenarkan permohonan defendan-defendan dengan memutuskan, antara lain, bahawa (i) plaintif-plaintif telah menyerahkan sistem kereta kabel secara sukarela kepada defendan kedua; dan (ii) tindakan pihak plaintif terhalang oleh had masa. PK, walau bagaimanapun, tidak menerima masuk surat 'tanpa prejudis' tersebut. Oleh itu, rayuan-rayuan ini. Plaintif-plaintif menghujahkan bahawa tindakan pihak defendan dalam urusan dengan pihak plaintif merupakan isu yang memerlukan soal siasat terperinci melalui perbicaraan penuh memandangkan terdapat fakta-fakta yang dipertikaikan dalam kes ini.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Tengku Maimun Tuan Mat HMR menyampaikan penghakiman mahkamah:

(1) Antara fakta-fakta material yang tidak dipertikaikan adalah: (i) pelantikan defendan kedua untuk mengendalikan sistem kereta kabel berikutan keputusan Menteri Kewangan dan Perdana Menteri terdahulu, sepertimana JVA dimasuki antara plaintif pertama dan defendan pertama; dan (ii) dengan mematuhi keputusan Perdana Menteri, plaintif kedua telah menyerahkan sistem kereta kabel itu kepada defendan kedua dengan suci hati. Satu-satunya isu yang masih belum diputuskan di antara plaintif-plaintif dan defendan-defendan adalah berkenaan bayaran pampasan atau perbelanjaan hangus yang dialami oleh pihak plaintif.

(2) Pada 10 November 2002, keseluruhan set fakta yang membangkitkan suatu tuntutan yang boleh dikuatkuasakan telahpun wujud. Pernyataan tuntutan terpinda menunjukkan bahawa pihak plaintif mengetahui tentang tarikh 10 November 2002. Selanjutnya, fakta bahawa plaintif-plaintif telah mengetahui yang defendan kedua akan mengambil alih penyenggaraan, operasi dan pengurusan sistem kereta kabel pada 10 November 2002 juga dibuktikan melalui surat peguamcara pihak plaintif kepada defendan pertama bertarikh 8 Disember 2002. Pada masa itu, terdapat pelanggaran atau ugutan pelanggaran hak plaintif-plaintif di bawah JVA. Oleh itu, pemfailan tindakan baru oleh plaintif-plaintif pada 23 November 2008 telah melampaui had masa enam tahun seperti yang diperuntukkan di bawah s. 6 Akta Had Masa 1953 dan melampaui had masa tiga tahun di bawah PAPA yang terpakai kepada defendan pertama di bawah s. 6 Akta Lembaga Pembangunan Langkawi 1990.

(3) Memandangkan had masa tiga tahun telah pun tamat tempohnya, plaintif-plaintif tidak mempunyai isu untuk mengambil tindakan terhadap defendan pertama bagi tort konspirasi. Kausa tindakan konspirasi terhadap defendan kedua tidak boleh bertahan memandangkan salah satu unsur yang perlu dipatuhi adalah suatu perjanjian antara dua atau lebih orang.

(4) PK tidak khilaf apabila beliau enggan membenarkan surat 'tanpa prejudis' diterima masuk. Dalam apa jua keadaan, surat itu tidak menyatakan apa-apa untuk mencadangkan bahawa defendan-defendan telah bersetuju untuk pemfailan semula tindakan baru di luar tempoh had masa. Adalah munasabah untuk mengharapkan plaintif-plaintif mematuhi kehendak undang-undang berkenaan had masa jika mereka bercadang untuk memfailkan tindakan baru.

(5) Penghakiman yang diberikan bagi tuntuan balas defendan pertama tidaklah keterlaluan memandangkan plaintif-plaintif telah menyerahkan sistem kereta kabel tersebut. Tambahan lagi, tiada afidavit daripada pihak plaintif untuk menafikan hujahan defendan pertama bahawa plaintif-plaintif menduduki serta menjalankan perniagaan di gerai-gerai itu tanpa membayar sebarang sewa.

Case(s) referred to:

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Lee Hock Ning v. Government of Malaysia [1972] 1 LNS 66 FC ***(refd)***

Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***

Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals [2008] 6 CLJ 626 CA ***(refd)***

Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications [2010] 5 CLJ 32 CA ***(refd)***

SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389 CA ***(refd)***

Legislation referred to:

Lembaga Pembangunan Langkawi Act 1990, s. 6

Limitation Act 1953, s. 6

Public Authorities Protection Act 1948, s. 2

Rules of the High Court 1980, O. 14A, O. 33 r. 2

For the appellants - Harpal Singh Grewal (CK Lim, Reny Rao and Chuah Yih Chuan with him); M/s Chooi, Saw & Lim

For the respondents - Karin Lim (Shamshul Jamil with him); M/s Presgrave & Mathews

[Appeal from High Court, Alor Setar; Civil Suit No: 22-309-2008]

Reported by Kumitha Abd Majid

A

JUDGMENT

Tengku Maimun Tuan Mat JCA:

[1] Both appeals were filed by the appellants/plaintiffs against the decision of the High Court at Alor Setar in allowing the respondents/ B defendants' application under O. 14A and/or O. 33 of the Rules of the High Court (RHC) 1980, which resulted in the appellants/plaintiffs' action being struck out and judgment entered for the first respondent/first defendant's counterclaim. We heard both the appeals together and had dismissed the same. For ease of reference, in this judgment the parties will be referred to C as they were in the High Court and any reference to the appeal record will be the record for Appeal No. K-02(IM)-2716-11/2012.

The Background

[2] Lembaga Pembangunan Langkawi (LADA) was the owner of the Langkawi Cable Car System (the Cable Car System). On 28 August 2002, D LADA (the first defendant) entered into a joint venture agreement (JVA) with Machinchang Skyways Sdn Bhd (the first plaintiff) in which both parties had agreed amongst others, to form a joint venture entity to manage, maintain and operate the Cable Car System. The joint venture entity formed for that purpose was Langkawi Cable Car Sdn Bhd (the second plaintiff).

E

[3] On 30 November 2002 the first defendant entered into an agreement with Syarikat Prasarana Negara Bhd (the second defendant) whereby the second defendant was appointed as the exclusive operator for the maintenance, operation and management of the Cable Car System (the Prasarana Agreement).

F

[4] On 10 December 2002 the plaintiffs filed a suit against the defendants (the first suit), *inter alia* to restrain them from interfering with the operation of the Cable Car System and for damages arising from the breach of JVA.

[5] The plaintiffs contended that at the material time, the first defendant G had approached the first plaintiff to settle the matter. The plaintiffs withdrew the first suit but continued to maintain control of the Cable Car System pending negotiation of a settlement.

[6] It is the plaintiffs' case that in response to the plaintiffs' terms of settlement in a letter dated 2 January 2003, the first defendant through its H solicitors letter dated 3 January 2003 represented that it would make appropriate compensation for the plaintiffs' losses and damages and that if the parties were unable to reach a settlement in due course, the plaintiffs were at liberty to file a fresh suit to recover the losses and damages suffered.

[7] Pending the finalisation of the proposed settlement, the plaintiffs had I delivered possession of the Cable Car System to the second defendant.

[8] No settlement was reached between the parties. On 20 November 2008, the plaintiffs filed a fresh suit against the defendants. In the fresh suit (the subject suit of the appeals herein), where the plaintiffs' cause of action was based on tort of conspiracy; breach of JVA and tort of inducement of breach of contract, the plaintiffs pleaded *inter alia* that:

(i) the second defendant had wrongfully and without reasonable basis or justification induced the first defendant to breach the JVA by offering themselves to be appointed to manage the Cable Car System and/or has influenced and/or has encouraged the first defendant to enter into the Prasarana Agreement with the second defendant which had caused losses to the plaintiffs.

(ii) around 30 November 2002 whether prior to or subsequent to the Prasarana Agreement, the first and the second defendants had conspired to injure the interest of the plaintiffs.

[9] Essentially, the defence of the defendants was that the Prasarana Agreement was signed between the first defendant and the second defendant based on the decision of the Minister of Finance and the Prime Minister then; that the plaintiffs have voluntarily surrendered the management of the Cable Car System and that the plaintiffs had acquiesced to the surrender. The defendants denied the allegation of conspiracy and pleaded that the plaintiffs' fresh suit is barred by limitation under the Limitation Act 1953 and/or the Public Authorities Protection Act 1948 (the PAPA Act). The first defendant counterclaimed against the plaintiffs for a declaration that the JVA be terminated jointly. As against the second plaintiff, the first defendant prayed for the surrender of vacant possession of the retail outlets which was carried out by the second plaintiff at the Cable Car station and for damages arising from the second plaintiff's occupation of these retail outlets.

[10] The first and the second defendants then took out separate applications under O. 14A and/or O. 33 r. 2 of the RHC 1980 (encls. 42 and 43 respectively), seeking the determination of the following questions of law; namely whether the plaintiffs' fresh suit was barred by limitation pursuant to s. 6 of the Limitation Act 1953 and/or s. 2 of the PAPA Act. The applications also prayed for the fresh suit to be dismissed and in respect of encl. 42, for final judgment to be entered against the second plaintiff in terms of the first defendant's counterclaim.

[11] The learned Judicial Commissioner allowed the applications. In a single judgment written for both applications, the learned Judicial Commissioner found as follows:

> [15] Di dalam kes ini mahkamah dapati kausa tindakan berlaku pada 10.11.2002 manakala writ saman dan penyata tuntutan difailkan pada 23.11.2008, oleh yang demikian Mahkamah putuskan tindakan Plaintif adalah difailkan di luar tempoh masa 6 tahun berdasarkan peruntukan di bawah Akta Had Masa ...

A [16] Merujuk kepada Akta Perlindungan Pihak Berkuasa Awam 1948, yang mana dinyatakan sebarang tindakan yang ingin diambil bagi isu-isu berkaitan komplot, hendaklah difailkan dalam masa 36 bulan daripada berlakunya aduan komplot. Di dalam kes ini Plaintif telah mengetahui mengenai fakta bahawa Defendan Pertama telah melantik Defendan Kedua untuk menguruskan operasi sistem kereta kabel di Langkawi pada
B 10.11.2002 melalui surat daripada peguamcara Defendan kepada peguamcara Plaintif. Plaintif mengakui membalas surat bertarikh 10.11.2002 yang dijawab pada 14.11.2002.

[17] Plaintif Kedua telah menyerah kereta kabel kepada kedua-dua Defendan dengan sukarela. Perlakuan Plaintif menunjukkan bahawa
C Plaintif telah bersetuju (acquiesced) untuk menyerahkan hak pengurusan, perkhidmatan dan penyelenggaraan dan operasi sistem kereta kabel.

[18] Keterangan yang dikemukakan dalam Afidavit kedua-dua pihak menunjukkan bahawa Plaintif memang mengetahui tentang tindakan yang diambil oleh Defendan mengenai operasi kereta kabel seawal
D 10.11.2002 seperti yang terkandung dalam surat bertarikh 8.12.02.

[19] Berdasarkan alasan-alasan di atas Mahkamah membenarkan permohonan Defendan Pertama dan Defendan Kedua di Lampiran 42 dan 43 di bawah Kaedah 14A Kaedah-Kaedah Mahkamah Tinggi 1980 (KMT) dengan kos sebanyak RM3,000.00.

E **The Appeal**

[12] It was the submission of learned counsel for the plaintiffs that the disposal of the fresh suit under O. 14A and/or O. 33 r. 2 is inappropriate as the question posed by the defendants in their application is a mixed question of law and fact; that the facts relied upon by the defendants are hotly
F disputed and that the question of when the plaintiffs' cause of action started to accrue is a question of fact. The plaintiffs contended that the causes of action against the first defendant started to accrue from 30 November 2002 ie, the date of the Prasarana Agreement and the appointment of the second defendant to operate the Cable Car System and that the act of breach by the
G defendants only occurred on 30 November 2002 and not on 10 November 2002.

[13] Likewise, learned counsel submitted, the cause of action against the second defendant also started to accrue from 30 November 2002 because the entire set of facts giving rise to a cause of action on tort of conspiracy and
H tort to induce breach of contract existed only when the JVA was breached, ie, on 30 November 2002. Hence it was contended that the filing of the fresh suit on 23 November 2008 did not exceed the six years limitation period.

[14] Citing *Lee Hock Ning v. Government of Malaysia* [1972] 1 LNS 66; [1972] 2 MLJ 12; *Puspavathy Thaveethu v Majlis Perbandaran Klang & Ors And*
I *Other Appeals* [2008] 6 CLJ 626, learned counsel for the plaintiffs submitted that the learned Judicial Commissioner erred in failing to consider that the

first defendant could not rely on s. 2 of the PAPA Act when the act complained of is the breach of contract and that the PAPA Act does not apply to the second defendant.

[15] The other issue raised by learned counsel for the plaintiffs was that the learned Judicial Commissioner erred in making a finding of fact that the plaintiffs had voluntarily handed over the Cable Car System to the second defendant when the applications before Her Ladyship was only to determine the relevant question of law.

[16] In respect of the judgment on the first defendant's counterclaim, learned counsel for the plaintiffs submitted that there was no basis for the learned Judicial Commissioner to allow the counterclaim when the first defendant had not proved that the plaintiffs were occupying the retail outlets without the first defendant's consent or permission.

Our Decision

[17] The main issue for our determination was on the appropriateness of O. 14A and/or O. 33 r. 2 applications. In a nutshell, the submission for the plaintiffs was that in all the circumstances of the case, the conduct of the defendants in dealing with the plaintiffs is an issue that requires thorough investigation at a full trial given the hotly disputed facts in this case.

[18] Contrary to the submissions of learned counsel for the plaintiffs, we found that the following material facts are not in dispute:

(a) the first plaintiff and the first defendant had entered into the JVA;

(b) the first defendant and the second defendant had entered into the Prasarana Agreement;

(c) the appointment of the second defendant to operate the Cable Car System was pursuant to the decision of the then Minister of Finance and also the Prime Minister, the same manner that the JVA was entered into between the first plaintiff and the first defendant;

(d) in adherence to the decision of the Prime Minister, the second plaintiff had surrendered the Cable Car System to the second defendant in good faith.

(e) the only issue outstanding between the plaintiffs and the defendants was in respect of payment of compensation or the 'out of pocket expenses' incurred by the plaintiffs.

[19] Learned counsel for the plaintiffs had submitted that the plaintiffs' causes of action accrued on 30 November 2002 and not on 10 November 2002. We were not able to agree with learned counsel.

[20] Paragraph 54 of the amended statement of claim shows that the plaintiffs knew about the date 10 November 2002 when the plaintiffs pleaded as follows:

> 14.1.1 Mukadimah tersebut secara curang tidak melambangkan keadaan yang sebenarnya:
>
> (a) pada tanggal 01/11/2002 suatu upacara "trial run" telah dilakukan sambil menarik 1608 orang penumpang;
>
> (b) pada tanggal 10/11/2002 telah dicatatkan bahawa Tan Sri Nor Mohamad Yaccob telah mendapatkan persetujuan Perdana Menteri supaya Defendan Kedua mengambil alih operasi Kereta Kabel Langkawi.

[21] The fact that the plaintiffs knew about the second defendant taking over the maintenance, operation and management of the Cable Car System on 10 November 2002 is also evident from the plaintiffs' solicitors letter dated 8 December 2002 to the first defendant which states *inter alia*:

> We are also instructed that by a letter dated 10th November 2002, you had informed LCCSB that you had been directed by the Honourable Prime Minister Dato Seri Dr. Mahathir Mohamed that the matter of the Business was to be withdrawn from LCCSB and given to Syarikat Prasarana Negara Bhd ...

[22] Given that the plaintiffs had known on 10 November 2002 of the fact that the maintenance, operation and management of the Cable Car System was given to the second defendant, it would be at that point of time that there was an infringement or threat of infringement of the plaintiffs' rights under the JVA. And if there is any conspiracy between the first and the second defendants as alleged by the plaintiffs, it would also be on 10 November 2002. On 10 November 2002, the entire set of facts giving rise to an enforceable claim were present (see *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32).

[23] Hence, the filing of the fresh suit by the plaintiffs on 23 November 2008 was clearly beyond the six years limitation period for the cause of action for contract under s. 6 of the Limitation Act 1953 and beyond the three years limitation period under the PAPA Act which is applicable to the first defendant pursuant to s. 6 of the LADA Act 1990 which provides:

> 6. The Public Authorities Protection Act 1948 (Act 198) shall apply to any action, suit, prosecution or proceeding against the Lembaga or against any member, officer, servant or agent of the Lembaga in respect of any act, neglect or default done or committed by him in such capacity.

[24] Learned counsel for the appellants had submitted that the defendants' applications were in substance striking out applications based on a plea of limitation. In this respect learned counsel submitted that the statute of limitation merely bars the remedy of the plaintiffs but not their cause of action.

[25] In our view, the defendants were at liberty to file the said applications. In *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663, Nik Hashim FCJ said:

> 23. Regarding the issue of limitation of time, the Court of Appeal appears to interpret it as barring a remedy but not the right to sue. That is not correct. In so far as PAPA is concerned, the law is settled. The Privy Council in *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 held that limitation under PAPA is "just as much a "right" as any other statutory or contractual protection against a future suit".
>
> 24. In this respect, both the Court of Appeal and the Federal Court have consistently struck out claims when it was clear that the statute of limitations would be relied on or raised.

[26] *Vide* para. 33 of the amended statement of claim, the plaintiffs' pleaded the following reliefs against the defendants:

> 33. Oleh yang demikian, Plaintif-Plaintif menuntut daripada Defendan-Defendan yang berikut:
>
> (a) penghakiman bahawa Defendan Pertama dan Defendan Kedua bayar ganti-rugi am kepada Plaintif Pertama dan Plaintif Kedua seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab perbuatan tort komplot dan seterusnya faedah pada kadar 8% setahun adalah atas jumlah ganti-rugi am yang ditaksirkan daripada tarikh penghakiman hingga penyelesaian;
>
> (b) secara alternatif kepada relif (c) di atas, (sic) penghakiman bahawa Defendan Kedua bayar ganti-rugi am kepada Plaintif-Plaintif seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab perbuatan tort mengganggu dengan perniagaan Plaintif-Plaintif dan seterusnya faedah pada kadar 8% setahun atas jumlah ganti-rugi am yang ditaksirkan daripada tarikh penghakiman hingga penyelesaian;
>
> (c) terhadap Defendan Pertama sahaja dan untuk manfaat Plaintif Pertama sahaja, penghakiman bahawa Defendan Pertama bayar ganti-rugi am kepada Plaintif Pertama seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab kemungkiran Perjanjian Usahasama tersebut dan seterusnya faedah pada kadar 8% setahun atas jumlah ganti-rugi am yang ditaksirkan daripada tarikh penghakiman hingga penyelesaian;
>
> (d) terhadap Defendan Kedua sahaja dan untuk manfaat Plaintif Pertama sahaja, penghakiman bahawa Defendan Kedua bayar ganti-rugi am kepada Plaintif Pertama seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab perbuatan tort mendorong Defendan Pertama untuk memungkiri Perjanjian Usahasama tersebut;

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(e) Defendan Pertama dan Defendan Kedua bayar kepada Plaintif Pertama dan Plaintif Kedua kos tindakan ini atas dasar kos peguam-anak guam; dan

(f) perintah dan/atau relif lain yang didapati suai manfaat oleh Mahkamah yang Mulia ini.

B

[27] Since the three years limitation period has expired, there is no issue of the plaintiffs suing the first defendant for the tort of conspiracy. Consequently, the cause of action of conspiracy against the second defendant cannot stand, as one of the ingredients to be satisfied in regard to the tort of conspiracy is that there must be an agreement between two or more persons

C

(see *Renault SA v. Inokom Corporation Sdn Bhd & Anor And Other Applications* [2010] 5 CLJ 32; [2010] 5 MLJ 394; *SCK Group Bhd & Anor v. Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389; [2011] 4 MLJ 393).

[28] The plaintiffs had relied on the 'without prejudice' letter dated 3 January 2003 (at p. 743:RR Jld 2(3) Bhgn B & C) to contend that the

D

defendants had represented that the plaintiffs are at liberty to re-file an action and is therefore estopped from pleading the issue of limitation. The relevant part of the letter reads:

3. Your clients should take cognizance that our client is a statutory body and will in all reasonable circumstances honour its obligations. In the event that parties are unable to reach a settlement your clients are at liberty to file a fresh action against our client.

E

[29] On this issue, the learned Judicial Commissioner had made the following finding:

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[12] ... Mahkamah tidak dapat menerima alasan Plaintif bahawa tindakan ini lambat diambil terhadap Defendan kerana terdapat rundingan untuk penyelesaian kerana rundingan dan perbincangan itu dibuat atas dasar "without prejudice". Merujuk kepada kes *Malayan Banking v. Foo See Moi* [1981] 2 MLJ 17, Hakim Mahkamah Agong Chang Min Tat memutuskan bahawa:

G

It is settled law that letters written without prejudice are inadmissible in evidence of the negotiation attempted.

[13] Dalam kes *Nagandran a/l Kalianna Gaundar (t/a Raju Restoran) v. Melinda Alison Monteiro & Ors* [2011] 4 MLJ 234:

H

It is pertinent to note that parties often make statement "without prejudice" as part of an attempt to settle a dispute. When this is done, the contents of the statement cannot be put in evidence without the express consent of both parties.

[30] In our view, the learned Judicial Commissioner had not erred in

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refusing to admit the said letter. In any event, we found that there is nothing in the said letter to suggest that the defendants had agreed to the re-filing of

a fresh suit outside the limitation period. It is reasonable to expect the plaintiffs to comply with the requirement of the law on limitation in the event they decided to file a fresh suit.

[31] The judgment given on the first defendant's counterclaim in our view is not perverse given that the plaintiffs had surrendered the Cable Car System. The first defendant had made the following averment in the 'afidavit balasan defendan pertama' (p. 181:RR Jld 2(1) Bhgn B & C):

> 14. ... Tiada asas untuk Plaintif-Plaintif terus menduduki serta menjalankan perniagaan di gerai-gerai di stesen kereta kabel tanpa membayar sebarang sewa.

We did not find any affidavit from the plaintiffs to deny or rebut the above averment.

[32] Based on all the above, it was our unanimous view that the learned Judicial Commissioner has not erred in allowing the defendants applications. We accordingly dismissed the appeals with costs of RM15,000 and ordered that the deposit be refunded to the appellants/plaintiffs.